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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 ABKCO MUSIC, INC., et al.,

4 Plaintiffs,

5 v.

15 CV 4025 (ER)

6 WILLIAM SAGAN, et al.,

7 Defendants.

8 -----x

New York, N.Y.
October 22, 2015
11:45 a.m.

10 Before:

11 HON. EDGARDO RAMOS,

12 District Judge

13 APPEARANCES

14 LOEB & LOEB
15 Attorneys for Plaintiffs
16 BY: BARRY SLOTNICK
17 TAL DICKSTEIN
SARAH SCHACTER

18 WINSTON & STRAWN
Attorneys for Defendants
19 BY: THOMAS LANE
DORIAN THOMAS

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(In open court, case called)

THE COURT: Good morning. We are here at the request of counterclaim defendants for leave to file a motion to dismiss.

So let me begin with you, Mr. Lane or Mr. Thomas.

MR. LANE: I will take the argument, your Honor.

THE COURT: Okay.

MR. LANE: So we believe the motion will be pointless if they make it. We believe that we set forth the essential elements of defamation in the complaint against third-party defendants, those four elements being set forth by the Court of Appeals. The arguments in favor of a motion to dismiss I don't think hold water, and I don't think the Court should entertain them. One is with respect to Section 74 of the civil rights section, and the other is with respect to whether or not those statements contained in the press release constitute opinion as opposed to fact.

Our position is that press release does not actually speak of allegations in the complaint, but sets forth a variety of things as being factual, which are also defamatory, and that do not appear in the complaint.

The complaint has an attachment to it, Exhibit A, which has approximately 600 potential copyrights that were allegedly infringed. And while I understand the plaintiffs have said that is an exclusive list, what the press release

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1 does is go far, far beyond that, and I think any reasonable
2 reader, as the courts have set forth, who looks at that would
3 determine that that is a reasonably acceptable defamatory
4 interpretation. And I will give your Honor some examples from
5 the press release that I don't think are in the complaint and
6 go toward defamation, particularly at this pleading stage where
7 we haven't reached any discovery.

8 In the press release itself, Mr. Israelite as well as
9 the NMPA set forth a variety of statements intended to be taken
10 as facts, such as much of BGA's content was never properly
11 licensed. The BGA site, as you may have learned during the
12 course of the scheduling conference, and I had an opportunity
13 to take a look at that transcript, has a whole variety of
14 different live recordings, concert recordings, memorabilia,
15 things for sale, and a whole host of different things in its
16 business model.

17 What this press release does is essentially attacks
18 the entire of the business model where Mr. Israelite goes on to
19 to say systematic copyright infringement cannot be a business
20 model, and it is unfortunate that Wolfgang's Vault chose not to
21 compensate all of the creators responsible for their content.

22 So these factual statements set forth as facts are
23 defamatory toward the BGA company, and they are far apart from
24 what I presume is the realm that the plaintiffs are going to
25 seek damages on, because I know, and our argument will be,

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1 about all of the licenses that we have litigated in the past,
2 whether it was with respect to Led Zeppelin and The Doors, the
3 Grateful Dead, and things like that.

4 So I think that looking at the cases we have cited,
5 Henneberry being one of them, the determination at this stage,
6 of course, is to accept all allegations as being true, to view
7 them in the light most favorable, in this case to third-party
8 plaintiffs, and make a determination as to whether or not the
9 statements are reasonably susceptible to defamatory
10 interpretation, and I think they are at this stage.

11 The other point on this, whether a fair and true
12 report under Section 74 presents some measure of immunity to
13 the press release statement. We have cited a case called
14 Pisani which states that allegations can be transformed into
15 fact. In the press release itself, they have not actually set
16 forth that it is an allegation that there is systemic copyright
17 infringement that constitutes my client's business model.

18 I think that's a key distinction among other
19 statements that they make in the press release, such as the
20 Wolfgang's Vault websites have profited in large part because
21 of the significant use of unlicensed music, primarily concert
22 footage, available on their sites. They're not drawing
23 specific allegations from the complaint related to those
24 plaintiffs they represent here. It's a wholesale indictment of
25 the company. And words matter.

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1 THE COURT: But doesn't that language, or the sum and
2 substance of that language, appear in the complaint?

3 MR. LANE: No, your Honor, what they have done is
4 cherry picked, for example, bits and pieces of words throughout
5 the complaint.

6 For example, they will take the word "massive" and say
7 the word "massive" appears in paragraph 67 or 71, I forget the
8 number, and they will take another word and say that word
9 appears on such and such a page. But I don't believe under the
10 case law and the intent of Section 74 this press release is
11 covered by that. Because I think statements such as systematic
12 copyright infringement cannot be a business model, that is not
13 contained in the complaint. It's not a quote from the
14 allegations of the complaint, and I think it goes beyond what
15 they have said they're complaining about.

16 There is no question that they have got broad language
17 at the very beginning of the complaint, as in an opening
18 statement, but any reasonable viewer or reader of the press
19 release itself I don't know would reach the conclusion that
20 this is necessarily coming from a lawsuit. A lawsuit is
21 mentioned, but it's not -- this is not phrased the lawsuit
22 alleges X or the lawsuit alleges Y, that is not contained in
23 this press release.

24 THE COURT: But a lawsuit is more than mentioned. The
25 whole purported purpose of the press release is to announce the

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1 lawsuit. No?

2 MR. LANE: My view of the purported purpose of the
3 press release is to defame my client, but I agree with you the
4 lawsuit is mentioned. However, the defamatory statements, it
5 is not said that those are from the lawsuit.

6 And what happened with this press release, your Honor,
7 is that it was picked up by another 14 different web sites and
8 over 400,000 Twitter users who were not accessing the lawsuit,
9 they were accessing the statements that are contained in here
10 that are not directly taken from the lawsuit. And I think that
11 even looking as a reasonable reader under both the Court of
12 Appeals cases that we cited to you as well as the Second
13 Circuit, a reasonable reader would view this as factual.

14 I think the argument that this is simply granted
15 immunity by Section 74 is flawed in that I think the press
16 release itself has statements as I read to the Court which are
17 not directly tied to the lawsuit. There's nothing about the
18 lawsuit that is intended to prove that my client's entire
19 business model is based on systematic copyright infringement.

20 THE COURT: Is the NMPA a plaintiff in this case?

21 MR. LANE: No, sir.

22 THE COURT: So what should I make the opening line of
23 the press release, that the National Music Publishers
24 Association, on behalf of, today filed a copy infringement
25 lawsuit.

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1 MR. LANE: Well, I think neither the NMPA nor
2 Mr. Israelite, who is named as an individual third-party
3 defendant by us, are named. There's a section of 74, which is
4 the last line of the statute itself, which says this section
5 does not apply to a libel contained in any other matter added
6 by any person concerning the publication or the report of
7 anything said or done at the time and place of such proceeding
8 which was not a part thereof.

9 I can't tell you standing here today whether that has
10 some application to the NMPA making these statements or
11 Mr. Israelite making the statements. I don't believe that
12 they're given any additional immunity outside of Section 74.
13 What I want them to do, and I haven't had an opportunity to do
14 it yet, is to look at the legislative history to explain that
15 sentence, because it's not, I think, clear on its face. But I
16 still think, whether they were initial plaintiffs or simply
17 folks commenting on the lawsuit, it is clear that the NMPA
18 gathered together these music publishers to get the lawsuit
19 started and are likely funding it.

20 THE COURT: And I guess the question really is did the
21 NMPA seek to cloak itself in immunity by posing itself as a
22 plaintiff in the lawsuit.

23 MR. LANE: And I think we need discovery with respect
24 to that. I think just on the four corners of the claim we set
25 forth the elements that are required under New York law, and I

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1 think there is some ambiguity under that section of the
2 statute, which, as our legislature sometimes does, it's hard to
3 determine just what's in the black and white words that are
4 there.

5 But no, the NMPA is not a plaintiff, and we had to
6 bring them in with respect to the defamation claim.

7 THE COURT: Okay, thank you.

8 Mr. Slotnick.

9 MR. SLOTNICK: Yes, your Honor, this is clearly a
10 press release. It says at least five times that it is dealing
11 with and announcing a lawsuit. The headline is NMPA Files
12 Lawsuit Against Wolfgang's Vault for Massive Copyright
13 Infringement.

14 THE COURT: Let me ask you about that. I don't know
15 that this is a big deal, but NMPA did not bring this lawsuit,
16 correct?

17 MR. SLOTNICK: NMPA is the trade association for the
18 plaintiffs, amongst other publishers, and it supervises and
19 administers litigation, including this one.

20 THE COURT: But it is not a plaintiff.

21 MR. SLOTNICK: It is not a plaintiff.

22 THE COURT: Okay.

23 MR. SLOTNICK: Your Honor, Mr. Lane is I think
24 quibbling about what is or is not massive and/or systematic.
25 He makes reference to the exhibit to the complaint, which is a

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1 76-page exhibit identifying infringements. As far as I'm
2 concerned, that's massive. It may also be systematic and
3 systemic to the defendants' business model. Whether this
4 should be a 760-page exhibit covering every song and every
5 infringement in Wolfgang's Vault web site is largely irrelevant
6 to this task. There is a fair reporting privilege, it is not
7 restricted to parties to litigation, and this is a fair
8 analysis of what the complaint says. It's a five-paragraph
9 press release that distills the 21-page complaint and the
10 76-page exhibit.

11 THE COURT: But it's structured -- well, at least the
12 paragraph that has been highlighted -- not as a, to use the
13 words from case law, a fair and true quotation or citation of
14 the complaint, it's structured in a form of statements by
15 Mr. Israelite. What are the parameters of what constitutes
16 fair and true? This isn't Mr. Israelite quoting the complaint,
17 this is him making a statement.

18 MR. SLOTNICK: Well, the first paragraph identifies
19 the lawsuit, the second paragraph quotes from the complaint,
20 the third paragraph paraphrases the complaint, the fifth
21 paragraph identifies what NMPA is and does, and in the fourth
22 paragraph, which the one that is seemingly is troublesome to
23 the defendants, Wolfgang's Vault's web sites have profited in
24 part because of significant use of unlicensed music, primarily
25 concert footage, et cetera.

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1 If one looks at the defendant's own answer and
2 affirmative defenses, there are I think 29 affirmative
3 defenses, only one of those 29 affirmative defenses even makes
4 reference to license. And they qualify that by saying well,
5 there's also consent or acquiescence. The remaining bulk of
6 the defendants' affirmative defenses are well, we were
7 innocent, or somebody else did it, or it was -- plaintiffs are
8 barred by statute of limitations or latches.

9 They're not saying they're licensed, they're saying we
10 may not have been licensed or the guys we got the rights from
11 may not have been licensed, but it doesn't matter anymore
12 because that happened too long ago and it happened by somebody
13 else. So in fact they are unlicensed. They may not be
14 infringers, I suspect that will be what this case will be
15 about, but in point of truth, there are no licenses, and they
16 have commented on that.

17 Our complaint is, for all intents and purposes, a
18 series of opinions. It is our opinion that they are
19 infringers. Their answer has been oh, no, we're not, which is
20 also an opinion. And the only one who will ever be able to
21 determine what the fact is is your Honor when your Honor
22 renders an opinion which determines whether or not they're
23 infringers or not. But the question to whether or not they're
24 unlicensed is exactly the subject matter of the complaint and
25 it's exactly what Mr. Israelite was commenting on.

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1 THE COURT: Except I think it's slightly different.
2 It's not they're unlicensed, period, it's they're unlicensed
3 and therefore illegally using these materials.

4 MR. SLOTNICK: And that is exactly what the complaint
5 says, that they are unlicensed and therefore infringers.
6 That's what he said.

7 The other comment, the systemic copyright infringement
8 cannot be a business model, first of all, it doesn't make
9 specific reference to the defendants, although obviously it
10 ties the defendant to that, and I think we can all agree that,
11 A, is an opinion, and probably is true, that illegal conduct
12 cannot be a legitimate business model. That's clearly an
13 opinion.

14 The first comment make reference to fact that these
15 are unlicensed works. All of the cases say that you have to
16 look at these comments in context. You don't look at them, as
17 defendant's letter suggests, at face value. You have to look
18 at the context. This in the context of announcing a copyright
19 infringement lawsuit in which the plaintiffs claim
20 infringement. It is a reference to the fact that the complaint
21 does talk about unlicensed works, and that, because of that,
22 these works are infringements. The cases all talk about the
23 fact that you're not limited to simply quoting from a
24 complaint, you're allowed to speak fairly and truthfully
25 without merely mimicking what's in the complaint.

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1 In every case, including some of the cases that the
2 defendants cite, even in Henneberry, literal meaning does not
3 always coincide with meaning in a grander setting. Isn't that
4 what we're talking about here? There is nothing that one would
5 read from this press release that would cast the defendants in
6 a false light. There is nothing that says that they're evil
7 people. There's nothing that says that they committed other
8 wrongdoings.

9 Now frankly, the way Mr. Lane now suggests is if we
10 were not allowed to make this motion, if this claim goes
11 forward, that opens up the door, based on what defendants have
12 said, to discovery not only of the 206 infringements and the 76
13 pages of exhibits, it opens it up to everything. Because if
14 they had, I don't know, 800 copyrights involved on their web
15 sites, the only way for to us prove the truth of that is to
16 look at all 800 or 8,000, and now we're talking about a very
17 different case where a very small tail is wagging what we still
18 believe is a very large dog.

19 THE COURT: I guess I see it slightly differently at
20 this point, and it's not -- because arguably from your
21 perspective you are saying they are evil people here, they are
22 taking money and keeping money that rightfully belonged to
23 members of the NMPA. And I guess the question I have: Does it
24 paint them in a worse light than what the complaint does?

25 MR. SLOTNICK: Well, your Honor, as a copyright

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1 lawyer, I can think of no crime worse than copyright
2 infringement, but I will recognize that there are other people
3 who might think that there are grander evils than copyright
4 infringement. I'm not one of them.

5 But the fact of the matter is you have a 21-page
6 complaint which identifies Wolfgang's Vault as an infringer.
7 You have a press release that says there is a 21-page complaint
8 that identifies them as infringers. There's nothing within the
9 confines of this press release that says anything wrong except
10 perhaps the defendants' only guilty conscious by what they have
11 done.

12 If this is not fair and accurate reporting, then what
13 the Court is saying is no one can ever report on a litigation
14 by saying anything other than putting everything in quotes.
15 And that seems to be -- we're now back to a writ system that if
16 you don't say the exact words in the exact order, your claim
17 gets thrown out. That's not what this should be. This is a
18 press release. It says exactly what happened, which is NMPA or
19 its publishers filed a lawsuit, and we don't see --

20 THE COURT: I think that's probably too easy a
21 description. It says more than that. It says they filed a
22 lawsuit and their business model is based on improper
23 infringing.

24 But let me hear from Mr. Lane.

25 MR. LANE: Thank you, your Honor, just a few quick

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1 points. Mr. Slotnick said one thing on licenses and we have
2 all these affirmative defenses and only mentioned it once.

3 Well, actually at page 21 and 22 of the counterclaims
4 and third party complaint, paragraph four: Importantly, all of
5 the recordings which make up defendants' collection were
6 created and have been exploited with permission and proper
7 legal consent from the various artists who controlled the
8 copyrights and the musical compositions they performed.

9 Page 22, paragraph 11: In particular, defendants
10 possess all of the appropriate performance rights and
11 mechanical and compulsory licenses necessary to conduct their
12 business lawfully, and have at all relevant times remitted
13 royalties as prescribed by law.

14 Second point, he said we should look at the press
15 release in context. Well, the context in which my clients and
16 their companies look at it, one of the contextual aspects is
17 damages. And after this press release was sent out and picked
18 up by 14 different web sites and over 400,000 Twitter users and
19 Facebook users, revenue at my companies dropped in double
20 digits. That's part of the context we're dealing with.

21 Point three, he said this doesn't show Wolfgang's
22 Vault as being evil people. Of course it does. It essentially
23 indicts the entirety of the company, each of the web sites they
24 cite in the complaint. But it's broader in this press release.
25 In this press release it's that all of the web sites have

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1 profited in large part because of the significant use of
2 unlicensed music, primarily concert footage available on their
3 sites. They are saying these things as facts, and they are
4 defamatory facts, and it's beyond what is contained in the
5 complaint.

6 I point your Honor to a case called Samson that we
7 cited in New York, a statement about a corporation is
8 defamatory per se when it relates to business as to affect the
9 confidence of the public. We directly see this press release
10 affecting the confidence of the public in how our revenues went
11 down by double digits.

12 These comments by Mr. Israelite are separate and apart
13 from the complaint. I'm not suggesting that each and every
14 time everything needs to be in quotes, but there needs to be a
15 connection that is more than what exists here, and this is
16 above and beyond, and it is defamatory saying that our entire
17 business model is based on systematic copyright infringement.

18 THE COURT: Let me ask you a question as I continue to
19 educate myself about this case. How long has your client been
20 around?

21 MR. LANE: They've been in business for approximately
22 two decades.

23 THE COURT: I take it this issue has come up before;
24 not the defamation issue, the infringing issue.

25 MR. LANE: Yes.

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1 THE COURT: What's the case law?

2 MR. LANE: Nothing has gone to trial. The largest
3 matter was a matter pending in the Northern District of
4 California which my firm represented the companies with Led
5 Zeppelin, The Doors, Carlos Santana, The Grateful Dead and a
6 variety of other artists, and it was resolved favorably by both
7 sides.

8 THE COURT: So they have been settled, these cases.

9 MR. LANE: Yes. Some smaller matters have been
10 dismissed on summary judgment and our motion related to
11 licenses, but the largest one has been that one, and that one
12 was settled.

13 THE COURT: Okay. Mr. Slotnick, I don't know if you
14 wanted to respond.

15 MR. SLOTNICK: Your Honor, just briefly. Mr. Lane
16 mentioned the Pisani case which he cited, and again, there's
17 nothing within this that suggests more serious conduct than
18 copyright infringement. If people perceive copyright
19 infringement to be an evil, then they perceive it to be an
20 evil, but this doesn't talk about anything else.

21 What Mr. Lane's and defendants' argument boils down to
22 is that 206 infringing works, 76 pages worth of alleged
23 infringing acts is not systematic. It seems to me like a
24 pretty large number, and if it's not systematic, then what this
25 issue will come down to is how many works were there and how

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1 many of them constitute a system of infringement or a system of
2 unlicensed use.

3 If that's the quibble, then that has no place in
4 dealing with fair and accurate reporting or an opinion. If
5 we're talking about 206 works being infringed less than
6 systematic, more than systematic or systematic, isn't that
7 really the definition of someone's opinion?

8 THE COURT: Why is this 206 works?

9 MR. SLOTNICK: I think we have 206 different
10 copyrights involved in the lawsuit and 76 pages worth of
11 infringing activities because they have been infringed in
12 multiple arenas in different ways.

13 THE COURT: Okay.

14 MR. LANE: Just one thing, if I may, whether he's
15 talking about 260 or 600, there are over 5,000 recordings
16 available on the web site, so when there's an indictment of the
17 entirety of the web site and the business model, it's
18 implicating a lot more than 260 or 600 when we have more than
19 5,000 individual copyrights just I believe with respect to
20 recordings, not counting poster art and everything else.

21 THE COURT: Okay. I think that there's at the very
22 least a colorable basis for the motion, so can you file it.
23 How much time do you want?

24 MR. SLOTNICK: Your Honor, could we have three weeks
25 to file?

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1 THE COURT: Very well.

2 And to respond, Mr. Lane?

3 MR. LANE: Could I have the same, your Honor?

4 THE COURT: Okay. And two weeks to reply. So three,
5 three and two.

6 DEPUTY CLERK: The motion is due on November 5, 2015,
7 the opposition is due November 30, 2015, and the reply is due
8 December 4, 2015.

9 THE COURT: You have those dates. And discovery is
10 otherwise proceeding apace?

11 MR. SLOTNICK: Yes.

12 THE COURT: Anything further?

13 MR. LANE: Judge, I just want to put on the record
14 today we have in the courtroom the misfortune of shadowing me
15 as an attorney, Jean-Luc Fournier, who has a doctorate in law
16 from France and is the chief expert in the highest court in
17 France on financial matters. I wanted to introduce him.

18 THE COURT: You're very welcome, welcome here. And we
19 are adjourned.

20 oOo